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IN THE

Supreme Court of the United States

OCTOBER TERM. 19

No. 318

W.R.B. CORPORATION, ET AL, d b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR, AND FIVE; J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,

Petitioners

v.

ODELL GEER, d/b/a ODELL GEER COMPANY, AND B. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,

Respondents

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 19____

No. _____

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,
Petitioners

v.

ODELL GEER, d/b/a ODELL GEER COMPANY,
Respondent

v.

J. E. RILEY & SON, INC., MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,
Petitioners

AND

W.R.B. CORPORATION, ET AL, d/b/a ROBERTSON CONSTRUCTION COMPANY AND ALLIED BUILDERS, ET AL, AND FORT HOOD HOUSING CORPORATIONS NOS. ONE, TWO, THREE, FOUR AND FIVE,
Petitioners

v.

B. H. (BERT) CAMP, d/b/a B.H.C. MATERIALS COMPANY,
Respondent

v.

MASSACHUSETTS BONDING AND INSURANCE COMPANY AND REPUBLIC NATIONAL BANK OF DALLAS,
Petitioners

PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS W.R.B. Corporation; WME, Inc.; WMI, Inc.; WMEK, Inc.; Paul Investment Co., Inc.; Helen Investment Co., Inc.; Nelson Gardens, Inc.; WRH Corporation; Saymax Investment Corporation; WMIK, Inc.; WRJ Corporation; Sayell Investment Corporation; Sayirv Investment Corporation; WRM Corporation; Sayman Investment Corporation; Boharl Investment Co.; Anna Investment Co., Inc.; Allied Builders; Bonded Building Company; Cal-Tex Co.; Don Construction Co.; E-J Contractors, Fort Hood Housing Corporations Nos. One (1), Two (2), Three (3), Four (4), and Five (5); J. E. Riley & Son, Inc.; Massachusetts Bonding and Insurance Company; and Republic National Bank of Dallas, pray that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in two cases (1) W.R.B. Corporation, et al v. Odell Geer, d/b/a Odell Geer Company; (2) W.R.B. Corporation, et al v. B. H. (Bert) Camp, d/b/a B.H.C. Materials Company, consolidated in the Trial Court and on appeal in the Fifth Circuit.[1]

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[1] Two cases are consolidated for this petition. Motion to Consolidate the Record on Appeal and Order of Court Consolidating Record on Appeal appearing as Appendix A. Both cases, referred to in the opinion of the Fifth Circuit as the "Geer case" and the "Camp case" involve suits instituted by an "eligible builder"—Petitioner Robertson Construction Company, a trade name for some seventeen corporations associated as joint ventures with some five associated corporations, under the Capehart Housing Act (69 Stat. 635) against sub-contractors Geer and Camp. Geer and Camp joined issues with Robertson's complaints and filed counter-claims and cross-actions against the eligible builder's bonding company (Massachusetts Bonding and Insurance Company) and the escrow agent used in

Citations To Opinions Below

The opinion of the Fifth Circuit Court is unreported and is printed as Appendix B, hereto, infra, p. 20; the judgment of the Fifth Circuit is printed as Appendix C, hereto, infra, p. 22. The opinion of the Circuit Court of Appeals, Appendix B, is the second opinion written by that Court, the case having been appealed twice. The first opinion written by that Court vacating and remanding the judgment of the District Court, is printed as Appendix D, hereto, infra, p. 24. The opinion of the Circuit Court of appeals on the first appeal is printed in Appendix D, hereto, infra, p. 24, is reported in 313 F. 2nd 750.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 20, 1964, p. 22, infra. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

Have the Petitioners been denied rights protected by the due process element of the Fifth Amendment, U. S. Constitution and Rule 53(b), Federal Rules of Civil Procedure when the judgment here entered against them was on the basis of a report filed by a

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the Capehart closing (Republic National Bank of Dallas, Texas). Volume 1 of the accompanying record is the record on second appeal to the Fifth Circuit and volumes 2 through 5 constitute the record on the first appeal.

special master appointed by the Trial Court, after the Trial Court referred the cases initially to a master, before whom the cases were tried in toto, but who died before findings of fact were reported, or did the Trial Court err in not ordering a trial de novo before the special master, himself, or a new master after it was determined that controverted fact issues existed so as to give the Petitioners the benefit of full, judicial hearing on all the evidence.

Provisions of the U. S. Constitution Involved

The constitutional provision involved here is the Fifth Amendment, and is printed in Appendix E, infra, p. 32.

Rules of Procedure Involved

The Federal Rule of Civil Procedure involved here is Rule 53, and is printed as Appendix F, infra, p. 33.

Statement

Both the Geer and the Camp cases, consolidated, were referred to the Honorable Jack Walker as master under a Rule 53, appointment (R. 72, 169) and both cases were tried in toto before that master (R. 194, 1085). He heard all of the witnesses, passed upon the authenticity of the documentary evidence, and requested and received trial briefs by all adverse parties (R. 1158); however, before the master was able to file his findings of fact and

conclusions of law (Rule 53(e), Fed. Rules of Civil Procedure) he became incapacitated and died shortly thereafter.

Whereupon, the Trial Court appointed the Honorable Tom Conway as successor master ("Special Master") who caused to be prepared and filed his report, a draft of which was sent to counsel (R. 2). Petitioners objected to certain proposed findings (R. 75). A hearing was held before the Trial Court on the proposed findings of the special master, at the termination of which hearing, the Trial Court overruled all objections by Petitioners to the proposed findings of the special master, sustained the objections of Respondents to some of the proposed findings, and entered judgment against Petitioners. (R. 104, 1121).

On the first appeal of the cases (also consolidated), the United States Court of Appeals, Fifth Circuit, rejected the position of Petitioners as set out in their briefs there, that they had been denied certain constitutionally protected rights and that the tests under Rule 53 had not been complied with, but, nevertheless, vacated and remanded the causes to the Trial Court, without "assay(ing) the correctness of any of the findings or conclusions of law by the master. . . ." Appendix D, infra, p. 24.)

On the second hearing, the Trial Court rejected the request that a trial de novo be had before the Court, another master, or some duly constituted superintendent, at least with regard to the controverted facts issues (R. 36), heard argument of counsel

(R. 16, et seq.), overruled Petitioners' contentions and entered an identical judgment against Petitioners as was previously complained of. Once again, the case was appealed, and affirmed on the theory that the Trial Court had correctly applied the "clearly erroneous standard in the review of the findings of the master" under Rule 53(a)(2); the Court of Appeals made no mention of points originally assigned that Petitioners had been denied rights protected by due process. Appendix B, infra, p. 20.

Reasons for Granting The Writ

1. The decision of the Court below in the instant case as it now stands, is in direct conflict with the decision of the Seventh Circuit case of *Smith v. Dental Products Co.*, 168 F. 2nd 516. The opinion in the Smith case is reported in full as Appendix I, infra, p. 42. In the Smith case, the Trial Court had referred the cause to a master to take and report an accounting as to profits and damages for infringment of plaintiff's trade-marks. The master there heard evidence but died before making any findings or report. The Circuit Court, in holding the entire proceedings thereafter conducted, a nullity, stated:

> "We are confronted with another serious question, that is, the effect of the master's death before he had made a report. The evidence was controverted; several hearings were had, controverted testimony was submitted and the master himself remarked that the status was such that he might require the submission of

further evidence. In other words, the master's judgment upon the credibility of the witnesses appearing, we can never know. The rules contemplate that the District Court shall approve the findings of the master 'unless clearly erroneous', but what the master thought about the witnesses, what he could have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, and the reference so far as legal effect is concerned, is a nullity.

"Nor did the District Court see the witnesses. In Buchsbaum & Co. v. Federal Trade Commission, 7 Cir., 153 F. 2nd. 85, 87, this court dealt with a similar situation. There a trial examiner of the Federal Trade Commission died before rendering his decision. We said: 'The elementary principle underlying all trials of whatever nature seems to be that the rule of confrontation shall be applied where the witnesses are available for that purpose, * * * Here there is no claim by anyone that the witnesses were unavailable, and counsel has cited no decision of our Supreme Court which in any way abrogates the ruling in the Ohio Bell Telephone case (Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093) and the Morgan case (Morgan v. United States, 304 U.S. 1, 58 S. Ct., 773, 82 L. Ed. 1129), supra, both of which cases hold that a failure in this respect would amount to failure of due process.' The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have

a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. In Morgan v. United States, 298 U.S. 468, at page 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288, the court said: 'There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Ry. Co., supra (265 U.S. 274, 44 S. Ct. 565 68 L. Ed. 1016). Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.' See also in re Rubin and Lipman, D.C., 215 F. 669; McAllen v. Souze, 24 Cal. App. 2d 247, 74 P. 2d 853; People v. Lewe, 383 Ill. 549, 50 N.E. 2d 577; Wainright v. P. H. and F. M. Roots Company, 176 Ind. 682, 97 N. E. 8; Labonte v. Lacasse, 78 N. H. 489, 102 A. 540; Hawley v. Priest

> Rapids Ice & Cold Storage Co., 172 Wash. 71, 19 P. 2d 400. We think it was the duty of the District Court, in the absence of findings and report from the Master, in order to afford the parties a hearing within the recognized legal meaning of that word, to direct the trial de novo before another master or before itself."

This conflict is further compounded by an earlier decision by the D.C. Circuit Court, *D.M.W. Contracting Co. v. Stolz*, 158 F. 2nd. 405 (cert. den. 330 U.S. 839), where the intermediate appellate court held that the report of a successor master, appointed after the death of the original master before whom the evidence was taken, may be given the same effect as the report of a master before whom the entire proceedings took place, the court stating in justification for this conclusion,

> "(T)he parties ought not to be put to the unnecessary expense of resubmitting their evidence, but should be permitted to use the evidence already present." 158 F. 2nd at 407.[2]

Whether the court below here or in the Smith case or the court in the D.M.W. case is correct is

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[2] The *ratio decidendi* of the court in the D.M.W. case brings to mind the language of this court speaking through Justice Cardozo in a similar case (quoted and relied on by the court in the *Smith v. Dental Products* case): "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored . . . There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such." *Morgan v. U.S.*, 298 U.S. 468 at 480.

for this court to decide. The court in the D.M.W. case bottomed its decision in considerations of expendiency; the court in the present appeal did likewise. The court in the Smith case bottomed its decision in multiple considerations of due process and the wording of Rule 53. Petitioners' opinion is that the holding of the Smith case should control, for the reasons set out therein.

2. Petitioners' property is taken by the present judgment without the due process protections provided for in the Fifth Amendment. Implicit in due process is the full and fair hearing requirement. The full and fair hearing test is not met, absent conformity with the traditional prerequisites for such proceedings, proceedings in which evidence is received under established rules, weighed by an independent superintendent, and facts found uninfluenced by extraneous considerations. Different cases focus on varying shades of these same due process compulsions in multicolored language: *Buchsbaum & Company v. F.T.C.* (153 F. 2nd 85) speaks in terms of "rule of confrontation" and "observing the demeanor of the witnesses;" *Smith v. Dental Products* (168 F. 2nd 516) teaches the lesson in terms of "judgment (of the trier of the facts) upon the credibility of the witnesses appearing", or "what (the trier of facts) thought about the witnesses", or "what (the trier of the facts) would have found as a matter of fact as to the verity of the testimony", or "a right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard";

Morgan v. U. S. (298 U. S. 468) mentions "(tradition of judicial proceedings) in which evidence is received and weighed by the trier of facts", and "(a hearing) designed to afford the safeguard that one who decides shall be bound in good conscience to consider evidence", and "(that the trier of the facts) shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action". Here Petitioners will never know the disposition made by the master of the numerous objections carried along with the trial for tardy determination, the judgment of the master on the credibility of the many expert and non-expert witnesses appearing, what the master thought about the witnesses as that requirement dove-tails into the "clearly erroneous" requirement of the reference rule, or what considerations would have influenced him in crystalizing the facts to be reported.[3]

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[3] The rule that someone must decide the admissibility, credibility, and supervise, finds expression in many state cases, including, In re Guardianship of Sullivan, 143 Cal. 462, 77 p. 153; *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N.E. 8, 14; *Hawley v. Priest Rapids Ice & Coal Storage Co.*, 172 Wash. 71, 19 P. 2nd 400; *McAllen v. Souza*, 24 Cal. App. 2nd 247, 74 P. 2nd 853; *Crow v. Industrial Commission*, 104 Utah 333, 140 P. 2nd 321 ("Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying . . . must either participate in the

3. The "clearly erroneous" test of Rule 52 (a), has not been correctly applied (and cannot be realistically applied) when the master before whom the case has been tried in toto does not find the facts, and the judgment of the court below to the contrary is incorrect.

Rule 52 contemplates that the Trial Court shall approve the findings of the master "unless clearly erroneous", (Appendix F, infra. p. 33) but it is not possible (as suggested in *Smith v. Dental Products*, supra.) to apply this test where the person reporting his fact findings, did not preside at the trial for

> ". . . what the master thought about the witness, what he would have found as a matter of fact as to the verity of the testimony, matters which are part and parcel of the purpose of the reference to the master to make findings and report to the court, are absent, . . ."

Rule 53 empowers the master to regulate the proceedings before him; Rule 53 empowers the master before whom the case is tried to take all measures necessary for the proper performance of his duties and the orderly disposition of the trial. *Connecticut Importing Co. v. Frankfort Distilleries*, 42 F. Supp. 225; *Cold Metal Process v. United En-*

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decision, or where, at the time the decision is rendered, he has severed his connections with the . . . fact-finding body, the record must show affirmatively that the one who finds the facts had access to the benefit of his findings, conclusions and impressions of such testimony, either written or oral reports thereof").

gineering, 92 F. Supp. 969. As noted above, the credibility of witnesses testifying before the master is for the master to determine (*Boone v. Equitable Holding Co.*, 32 F. Supp. 896, reversed on other grounds, *Beckley National Bank v. Boone*, 155 F. 2nd 513, cert. denied, *Boone v. Equitable Holding Co.*, 313 U.S. 558). The rule (Rule 53(c)) expressly contains the provisions that the master may (as was done here) require the production before him of evidence on all matters embraced in the reference, including the production of books, papers, documents, and other applicable writings. The same section of the rule provides that the master may rule on the admissibility of evidence (unless the order of reference provides to the contrary). It is true that a master to whom a reference has been made acts in an advisory capacity, and his report is advisory only, but it is equally true, that the court does not have the right to reconsider, weigh, and evaluate evidence to arrive at its own independent conclusions and the court may not refuse to recognize the master's findings or escape the conclusion to which the findings lead, merely because of a difference in personal persuasion on the evidence, or a dissatisfaction with the result reached, for the admissibility, credibility, etc., as to the evidence is within the peculiar cognizance of the master. *Krinsley v. United Artists Corp.*, 225 F. 2nd 579; *Sanitary Farm & Gammel*, 195 F. 2nd 106; *Leader Clothing Co. v. Fidelity & Casualty Co. of N. Y.*, 237 F. 2nd 7 ("It is the general rule that where a master has been appointed under Rule 53 (e) his findings should not be disturbed merely because the Trial

Court is of a different opinion or dissatisfied with the master's findings" at p. 11 of 237 F. 2nd).

Findings of the master based on oral testimony where credibility is involved are favored by the courts and are entitled to great weight, since the master had the opportunity to see and observe those who testified. *Helene Curtis Industries v. Sales Affiliates*, 121 F. Supp. 490 (affirmed, 233 F. 2nd 148, and certiorari denied in 352 U.S. 879).

It is difficult to reason with the court below in view of the role played by the master under a Rule 52 reference. The absence of a finding of fact filed by the hearing master eviscerates the entire proceedings and no alternative remains but re-trial of the controverted fact issues. Because this inherent defect exists in the present proceedings, Petitioners have been relegated throughout both appeals to an impossible burden, that is, to secure a "review" of evidence by points involving credibility, weight, etc. See Appendix G, infra., p. 38 for points of error assigned on the first appeal in No. 19,952, on the docket of the Court of Appeals and Appendix H, infra., p. 39 for points of error assigned on second appeal in No. 20,999. Petitioners' efforts were foredoomed, for what Petitioners have been crying out for is what the courts could not give under the present posture of the case, that is, that the conflicting testimony be weighed and be resolved in its favor, that the competency of its expert witnesses be given more force than those experts offered by Respondents, and that proper evaluation be made of all relevant factors. No amount of reading of the record

in this case could supply the successor master or the Trial Court with the raw materials for the application of a "clearly erroneous" review.

4. The question here presented is of great importance in the administration of the reference-to-a-master rule. Increasing use of Rule 53 for trial in government contract (and other) cases will give rise to instances similar to those present here, that is, that the master dies or becomes disabled prior to filing his report. The books already indicate that the courts have not resolved this problem area consistently. The time is ripe for this court to insure consistency and fairness of treatment to all concerned in like situations.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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On this the 22 day of July, 1964, two copies of this Brief were mailed to (1) Honorable Lee Curtis, Curtis, Duncan and Bragg, Belton, Texas, (2) Honorable Emory Camp, P. O. Box 552, Cameron, Texas, and (3) Honorable David Bragg, of Curtis, Duncan and Bragg, Killeen, Texas.

Robert C. Howell

ROBERT C. HOWELL